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In the Supreme Court of the United States

Samson Dubria,
Petitioner,
v.
G.A. Smith, Warden,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW (Rule 14.1(a))

1. IS IT A DENIAL OF DUE PROCESS OF LAW TO PERMIT POLICE INVESTIGATORS TO INFORM A JURY THAT THERE IS UNSTATED EVIDENCE AGAINST PETITIONER, THAT THE EVIDENCE OF GUILT IS CONCLUSIVE, THAT THE OFFICERS DISBELIEVE PETITIONER'S EXCULPATORY STATEMENTS, AND THAT THE JUDGE AND JURY WILL BELIEVE HE IS LYING WHEN HE PROTESTS HIS INNOCENCE IN COURT?

2. IS IT INEFFECTIVE ASSISTANCE OF COUNSEL TO NOT OBJECT TO THE PROSECUTOR'S ARGUMENT TO THE JURY THAT HE KNEW OF OTHER UNSTATED DAMNING EVIDENCE AGAINST PETITIONER AND CLAIMING THAT DEFENSE COUNSEL KNEW HIS CLIENT WAS GUILTY?

3. WHEN A SUSPECT IS ALONE AT THE PROSECUTOR'S OFFICE AND UNWARNED OF HIS CONSTITUTIONAL RIGHTS TO COUNSEL AND SILENCE, AND IS CONFRONTED WITH ACCUSATORY INTERROGATION ACCUSING HIM OF MURDER, IS IT OBJECTIVELY REASONABLE FOR THE SUSPECT TO BELIEVE HE IS FREE TO GO AT ANYTIME SO THAT NO ADMONITIONS PER MIRANDA v. ARIZONA, 384 U.S. 436 (1966), NEED BE GIVEN?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Samson Dubria respectfully prays that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals, sitting *en banc*, and entered on September 11, 2000.

I. OPINION BELOW (Rule 14.1(d))

The opinion of the Ninth Circuit Court of Appeal, sitting *en banc*, overturned a previous panel ruling granting petitioner's pre-AEDPA petition for writ of habeas corpus challenging his California conviction for first degree felony murder, rape by use of chloroform, and administering the drug to commit a felony. *See* Dubria v. Smith, 197 F.3d 390 (9th Cir. 1999 (original panel opinion). The *en banc* decision denying relief, with one dissent, is published in the official reporter at 224 F.3d 995. The *en banc* opinion is attached and cited as the "Appendix" to this petition.

II. JURISDICTIONAL STATEMENT (Rule 14.1(e))

Petitioner's conviction was affirmed by the California Court of Appeal in People v. Dubria, D018852, on July 18, 1995, an unpublished opinion. A petition for review was denied on October 19, 1995, in the California Supreme Court, with one justice voting to grant review. Thereafter, petitioner filed a petition for *certiorari* in this Court, No. 95-1029, which was denied on February 20, 1996. Petitioner filed a petition for writ of habeas corpus under Title 28 U.S.C. 2254 which was denied by the district court on February 24, 1998. He timely appealed to the court of appeals which initially reversed his conviction for due process violations by a 2-1 vote. Dubria v. Smith, 197 F.3d 390 (9th Cir. 1999.) On the State's request, a rehearing *en banc* was requested, granted, and on September 11, 2000, the *en banc*

court majority, with one dissent, affirmed the ruling of the district court denying petitioner's habeas petition. The jurisdiction of this court is based upon 28 U.S.C. 1257(a).

III. CONSTITUTIONAL PROVISIONS (Rule 14.1(f))

United States Constitution, Fifth Amendment, provides in part that : "... no person shall be compelled in any criminal case to be a witness against himself." It also guarantees that no person be denied due process of law.

United States Constitution, Sixth Amendment, guarantees the effective assistance of defense counsel.

United States Constitution, Fourteenth Amendment, guarantees that these constitutional rights shall be respected in the various states.

IV. STATEMENT OF THE CASE (Rule 14.1(g))

On August 15, 1991, petitioner, a twenty-eight-year old medical doctor with no criminal history, was on vacation in California with his friend, the decedent, Jennifer Klapper, age twenty. They had met and dated while he was serving his internship at a hospital in Cincinnati, Ohio, where she also worked. Petitioner had just begun his residency at the University of Medicine and Dentistry of New Jersey, when he invited her to join him for a week vacation in Southern California. She accepted.

They spent much of the week together vacationing and visiting tourist attractions. On August 15, 1991, at about 11:30 p.m., they went to a motel in Carlsbad, California, to spend the night. They had sexual relations which the State claimed was rape. At 3:07 a.m., petitioner called "911" to report that Ms. Klapper was in respiratory arrest. After CPR was administered

in the motel room by both petitioner and paramedics, she was rushed to the hospital, but it was too late. She was pronounced dead at 3:52 a.m.

The cause of death was said to be chloroform ingestion. Petitioner denied any knowledge of such ingestion. The theory of felony murder was that petitioner used chloroform to render Ms. Klapper unconscious so that he could have sex with her and that she died as a result of her reaction to the drug. As the prosecutor told the jury in opening statement:

> Our theory is not that he intended to kill her. [¶]... And even though he didn't intend to kill her, he may not have intended to kill her, under California law, if a person is killed in the commission of rape, even if it's accidental, even if it's unintentional, that's first degree murder. State Trial Reporter's Transcript (RT) 681.

No trace of chloroform was found on Ms. Klapper's clothes, the bedding, or anywhere else except in her body. The rape theory was central to the conviction in this case because once found, it made inevitable the murder conviction, it's degree (first), as well as the rape special circumstance which led to a life without parole sentence.

The jury convicted on evidence which was grounded primarily in a toxicologist's report finding traces of chloroform. Petitioner produced evidence at his trial and on collateral attack of the judgment in state and federal court contesting reliability of this toxicological evidence, which is not at issue here, but would weigh in any prejudice calculus of the constitutional errors

described below.

A key piece of evidence was a taped "statement" of petitioner which turned out to be the investigating detective's soliloquy on why he believed petitioner guilty complete with references to "evidence" never adduced at trial and other inflammatory references. A transcript of this tape recording was provided the jury over petitioner's objection.

On April 1, 1992, the District Attorney for San Diego County filed an information charging petitioner with one count of murder in the death of Jennifer Klapper, pursuant to California Penal Code section 187, rape by administration of drugs, pursuant to California Penal Code section 261a(3), and administering an anesthetic to aid in a felony, pursuant to California Penal Code section 222. CT 1-2.[1] Additionally, a rape murder special circumstance was alleged. Ibid.[2]

During the trial, the State was permitted to play the tape for the jury of the interview of petitioner by the case agent, Detective Detar and another officer. Petitioner objected that much of the tape was composed of Detar's lengthy statements of fact many of which were highly prejudicial, inflammatory and

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[1] "CT" stands for state court clerk's record. "RT" stands for the references to the state trial transcript. "ER" stands for the excerpt of record filed in the Ninth Circuit Court of Appeals.

[2] There are no questions of exhaustion of remedies in this habeas. Petitioner raised these federal constitutional issues in the state court and in the federal court in a timely manner and the rulings of the Court of Appeal are on the merits of the issues.

false. The trial court responded by saying it would give the jury limiting instructions. Later, the jury was given a transcript of the tape as an exhibit, again over petitioner's objection.

A few examples from the tape included statements that others had told the police of petitioner's guilt, that the scientific tests had all been completed and the evidence of guilt was conclusive, that the officer's believed petitioner guilty, and that the judge and jury would find his protests of innocence to be lies.

To further the allusion to "other" evidence, the prosecutor improperly argued to the jury at the end of the case that he could, if he had wanted, inform the jurors of other bad things about petitioner, but that he wouldn't because he knew they could think of them without him saying so. Further, he stated that petitioner (a medical doctor with no criminal record and with no history of acting out in an antisocial manner) was "a piece of garbage" whose own attorney knew he was guilty. The jury then convicted of all charges and petitioner was sentenced to life without parole.

V. REASONS FOR GRANTING THE WRIT

Pursuant to Supreme Court Rule 10 and 14(h), as amplified in the following arguments, compelling reasons warrant review of the three questions presented, particularly as to issue number 1, the admission of a police officer's recorded "soliloquy of guilt." Until now, no court precedent in the land permitted the introduction of such "evidence." The Ninth Circuit *en banc* opinion's finding such evidence "unremarkable" and harmless to petitioner's constitutional fair trial rights cannot withstand analysis. If followed by the trial courts, this precedent will constitute a serious threat to the due process rights of all defendant's on trial.

ARGUMENT

1. IT IS A DENIAL OF DUE PROCESS OF LAW TO PERMIT THE POLICE TO PLAY A TAPE AND TRANSCRIPT TO THE JURY TO FALSELY INFORM IT THAT THERE IS UNSTATED EVIDENCE AGAINST PETITIONER, THAT THE STATE'S EVIDENCE IS CONCLUSIVE, THAT THE POLICE PERSONALLY BELIEVE THE SUSPECT IS OBVIOUSLY GUILTY, AND THAT THE JUDGE AND JURY WILL BELIEVE HE IS LYING WHEN HE PROTESTS HIS INNOCENCE TO THEM.

The Court of Appeals *en banc* majority found nothing improper in giving the jury the tape, the transcript and the opportunity to read and listen to what amounted to pages of Officer Detar stating his lengthy and inflammatory soliloquy of guilt. Appendix, 10-13. The original panel majority opinion, however, found it a denial of due process of law. *See en banc* dissenting opinion, Appendix, 17-27, finding the comments presumptively prejudicial. Id. at 20, *citing* U.S. v. Harber, 53 F.3d 236, 238 (9th Cir. 1995).

As the original panel opinion stated, the comments of the investigating officer on the defendant's guilt were presumptively prejudicial and inadmissible, and when examined with the related prosecution misconduct in final argument, were cumulatively prejudicial to petitioner's fair trial rights. Dubria v. Smith, *supra* at 197 F.3d 400.

There could hardly be a more pernicious ruling to the concept of a fair trial than to allow the State to introduce as

evidence a police officer's lengthy, repeated and prejudicial statements to a suspect, call it part of the interrogation, and sustain conviction in close cases like this. This is not due process. In fact, it offends society's fundamental "sense of fair play and decency" and denies due process. Rochin v. California, 342 U.S. 165, 173 (1952). An American courtroom will not permit admission of such police-manufactured trial "evidence."

Just as in Alcorta v. Texas, 355 U.S. 28 (1957), where this court found a violation of due process when the State had presented a "false impression" of a key prosecution witness's credibility, here the State was permitted to do far more – among other things, to tell the jury, through the case agent's taped statements and the transcript given the jury, that other "unstated" evidence existed, that other people had told the police petitioner killed the deceased, and that the scientific evidence was "conclusive." This was untrue.

What the *en banc* majority overlooks in condoning this is that while interrogating police officers may be free to make long narrative statements to suspects to try to prod confessions and in the process convey false information, inflammatory notions about judge and jury hostility toward a suspect's protests of innocence, and repeatedly state beliefs in the suspect's "conclusive" guilt, those statements have no place before the jury. Police statements to suspects do not gain evidentiary admission at trial simply because they were made as a preface to interrogating a suspect. As petitioner's counsel stated when he broadly objected at trial to these statements (Appendix, 9), they were not petitioner's statements and should not have been admitted.

That is the issue in this case: may such highly prejudicial,

inflammatory and irrelevant statements be introduced to give context to an interrogation? The answer is clearly no and the due process right to a fair jury trial is grossly subverted by permitting it. Just as allowing the jury to hear a prosecutor's personal opinion on the defendant's guilt presents the danger that the jury will believe other evidence supports charges (U.S. v. Young, 470 U.S. 1, 18-19 (1985)), the same is no less true when the investigating officers are saying it to the jury and the prosecutor is presenting it as evidence.

It is unfortunate and wrong for the *en banc* majority to adopt the State appellate court characterization that these statements by the officers "were generally unremarkable" and that the jury would understand that this was merely the "police position." These unsubstantiated assumptions as to how a jury would characterize the statements are facially unreasonable, and are based on the false foundation that "the officers' comments... suggested no more than what the People proposed to prove at trial." Appendix, 10, n. 2 (quoting state court of appeal opinion.)

In no way did any evidence come in at trial from witnesses stating petitioner was guilty, that the scientific evidence was "conclusive" in showing guilt, nor were opinions elicited that petitioner was mendacious in his testimony. All of this would have been patently inadmissible if the State had actually tried to put the evidence on directly. Indeed, this was part of the reason the initial panel opinion overturned the petitioner's conviction as a violation of the due process right to a fair trial. 197 F.3d 390, 401.

It can hardly be said that the objectionable comments by the Detective on tape and transcript were relevant to petitioner's

answers because the objectionable parts were simply lengthy statements of fact (some false and highly prejudicial) and irrelevant opinions of guilt expressed by the officers. The majority's reliance on the trial court's cautionary instruction to the jury by the court is misplaced.[3] First, the majority is wrong in labeling the officer's statements as "mere questions and not as evidence." Appendix, 13. The statements were emphatic statements of "conclusive" scientific proof of guilt compounded by repeated assertions of personal belief in guilt and predictions that the judge and jury would hold the same view.

Such an off-point cautionary instructions could hardly be expected to cause the jurors to disregard adamant, repeated statements such as the officers' references to unnamed (nonexistent) persons who said petitioner was responsible for the homicide, or the "conclusive" evidence of guilt they held, or their repeatedly expressed beliefs in petitioner's conclusively shown guilt, or that the jurors and judge would disbelieve petitioner at trial. Even if the cautionary jury instructions were on the mark, as this Court has said, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great,

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[3] As the original panel concluded: "It is true that the jury was twice given a cautionary instruction that Detar's questions should not be considered for their truth, but only to place Dubria's answers in context. [n10 omitted] Still, given the extremely prejudicial nature of Detar's statements, as well as the fact that a transcript of the interview was also later given to the jury, [citations omitted]... we cannot conclude that the instructions cured the impact of Detar's inflammatory statements on the fairness of Dubria's trial." 197 F.3d 401.

and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." Bruton v. U.S., 391 U.S. 123, 135 (1968); *also cited in* Gray v. Maryland (1998) 523 U.S. 185, 190; *see also* Berger v. U.S., 295 U.S. 78, 85 (1935) (""It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken.")

Here, the fact that the statements came from the investigating officers made the statements more prejudicial given jury deference to the police and the status of these officers in summing up their investigation to petitioner. *See* Turner v. Louisiana, 379 U.S. 466, 474 (1965) (the fact that they were deputy sheriffs "made the association even more prejudicial"). This tape and transcript were extremely prejudicial not only because of the status of the police but also because it is an invasion of the jury's responsibility to determine the facts and witness credibility. U.S. v. Binder, 769 F.2d 595, 602 (9th Cir. 1985).

Indeed, the very case the *en banc* majority rely upon to suggest that cautionary instructions mitigate harm from prejudicial evidence, U.S. v. Merino-Balderrama, 146 F.3d 758, 764 (9th Cir. 1998), reversed the conviction because the limiting instruction could *not* dispel the prejudice from the improperly admitted evidence. *See* Appendix, 12.

Further, the attempt to distinguish Bruton from this case does not hold water. The majority state that petitioner could have examined Detar on the stand about his irrelevant and inflammatory taped statements he made to petitioner in his soliloquy of guilt during the interview, as if that option were a

cure to the prejudice from admission of such irrelevant and inflammatory material. That is no remedy at all given that it would only provide a platform for the officer to further a self-serving rationale for his opinions. Also, like Bruton, this remedy in no way allowed petitioner to confront the *non-existent* unnamed people that Detar falsely stated had concluded petitioner was responsible for the death of the victim.

State and federal courts have properly reversed convictions simply for the erroneous introduction of evidence of officers testifying to their belief in the guilt of a defendant or the veracity of a complaining witness. *See e.g.*, U.S. v. Harber, 53 F.3d 236 (9th Cir. 1995) (reversal required where case agent's report containing a summary of his investigation and his opinion that the suspects were guilty mistakenly given the jurors); Maurer v. Dept. of Corrections, 32 F.3d 1286, 1287 (8th Cir. 1994) (denial of due process of law to admit testimony from witnesses, including two police officers, that the victim was "sincere" in her claim of rape; held to be reversible under Brecht v. Abrahamson, 507 U.S. 619 (1993); Cooper v. Sowders, 837 F.2d 284, 287-288 (6th Cir. 1988) (officer improperly allowed to testify as expert on credibility which helped produce a "fundamentally unfair" trial); People v. Torres, 33 Cal.App.4th 37 [39 Cal.Rptr.2d 103] (1995) (peace officer's opinion that defendant committed the crimes did not assist jury and was not beyond common juror experience); People v. Sergill, 138 Cal.App.3d 34, 39-40 [187 Cal. Rptr. 497] (1982) (reversible error for officer to testify that child victim was telling the truth); People v. Brown, 116 Cal.App.3d 820, 829-830 [172 Cal.Rptr.221] (1981) (officer's testimony that defendant acted as a runner of drugs, and thus was as guilty as a seller, was

reversible error).

This court, in U.S. v. Scheffer, 523 U.S. 303, 313 (1998), upheld a statute which banned polygraph evidence at trial. In so holding, the court observed that the fundamental premise of our criminal trial system is that "the jury is the lie detector," and that the determination of the weight and credibility of witness testimony belongs to it. So too here. By their very nature, such police statements as are at issue here undoubtedly diminish the jury's role in making credibility determinations because of the excessive weight awarded the opinions of the investigating police officers.[4]

This Court has not retreated from the constitutional minimum that evidence be relevant. "An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issues of guilt or innocence." Bruton v. U.S., 391 U.S. 123, 131, fn. 6 (1968). Where the introduction of irrelevant evidence infects the trial with unfairness so as to deny due process, the right to a new trial is warranted. *See* Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); McKinney v. Rees,

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[4] Many lower federal court's have held that expert witnesses cannot testify about witness credibility because to do so usurps the exclusive function of the jury to weigh evidence and determine credibility. *See, e.g.*, U.S. v. Scop, 846 F.2d 135, 142 (2nd Cir. 1988); U.S. v. Ward, 169 F.2d 460, 462 (3rd Cir. 1948); U.S. v. Speer, 30 F.3d 605, 610 (5th Cir. 1994); U.S. v. Lipscomb, 14 F.3d 1236, 1239 (7th Cir. 1994); U.S. v. Samara, 643 F.2d 701, 705 (10th Cir. 1981)("an expert may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility".)

993 F.2d 1378 (9th Cir. 1993), *cert. denied* 126 L.Ed.2d 586 (admission of irrelevant, prejudicial prior act evidence denies due process of law).

Such evidence undermines a defendant's right to testify without unfair state impediments in that it allows the State to cruelly characterize the defendant's protests of innocence as perjury in its case-in-chief through police testimony before the defendant testifies.[5] Neither the courts below nor the respondent State of California cited a single precedent from any jurisdiction which holds that this evidence is properly admissible over objection. The ruling petitioner seeks is not one on which reasonable judicial minds can debate; it is basic due process. Due process gives a defendant a substantive right to a fair trial which includes the right to testify without the State putting on its agents

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[5] This court has been mindful to protect a defendant's right to testify from improper State impediments. *See* Brooks v. Tennessee, 406 U.S. 605 (1972), finding unconstitutional a state rule that provided that if a criminal defendant was to testify he or she had to do so before any other defense witness testified. In Griffin v. California, 380 U.S. 609, 614 (1965), it was held that comment on a defendant's failure to testify "is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." The Court found that "cutting down" the privilege, regardless of compulsion, constituted a Fifth Amendment violation. *See also* Rock v. Arkansas, 483 U.S. 44, 62 (1987)(excluding all post-hypnosis testimony by a defendant infringes on defendant's right to testify); Ferguson v. Georgia, 365 U.S. 570, 596 (1961) (the right of a defendant to testify is fundamental and a statute which prevents counsel from asking questions on direct violates due process).

to persuade the jury in advance that the defendant's version is a lie and to falsely state that other evidence never presented the jury is "out there."

California agents already overstep their constitutional obligations by interrogating "outside" Miranda v. Arizona, 384 U.S. 436, 448 (1966), that is, they do not give the warnings when they should confident that any admissions will still be useful to the investigation and to impeach any suspect who testifies. *See* issue 3, *infra*, pp. 21-22. This additional tactic of loading the interrogation questioning with prejudicial material cannot be constitutionally condoned. Certiorari should thus be granted to insure that police-suspect interrogations are not, as in this case, used as pretextual opportunities to introduce extremely prejudicial, false, and otherwise inadmissible material to the jury under the makeweight rationale that the matter is harmless because the jury will know this is merely the "police position."

2. IT IS INEFFECTIVE ASSISTANCE OF DEFENSE COUNSEL UNDER THE SIXTH AMENDMENT TO PERMIT A PROSECUTOR TO INFORM THE JURY HE KNOWS OF OTHER DAMNING UNSTATED EVIDENCE AGAINST THE PETITIONER AND THAT THE DEFENSE ATTORNEY KNOWS HIS CLIENT IS GUILTY.

This issue involves prosecutorial comments to the jury that "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637 (1974). Further, defense counsel was ineffective in failing to protect his client by objecting to the statements. The

majority opinion finds the following prosecutorial jury argument as proper and that defense counsel was effective in not objecting to it:

> But to get up here and get on the stand and look at you people and tell you that story that he told you in front of the family, **this piece of garbage,** making up every little bit of it, he's the biggest liar you've ever encountered. **He's a lot worse than that. I'm not going to tell you. You can imagine some of the things I would tell you what he really is. I'm not going to tell, because you know. You know in your hearts what else.** RT 2224; ER 321. *Emphasis added.*

Further, in responding to the defense statement that the jury would receive a lesser included instruction on manslaughter and its possible applicability to the facts, the prosecutor in rebuttal told the jury: "The reason he talked about involuntary manslaughter is because he knows that you know that the defendant is guilty." RT 2280; ER 322. (The majority opinion does not address this last comment in its opinion.)

Under the standard of Strickland v. Washington, 466 U.S. 668 (1984), waiving an objection based on mistake, inadvertence or negligence can be ineffective assistance of counsel under the Sixth Amendment. Kimmelman v. Morrison, 477 U.S. 365 (1986) (failure to make a motion for discovery which would have led to a motion to suppress illegally seized evidence constitutes ineffectiveness).

Here, the initial inquiry is whether there was misconduct in the prosecutor's statements. The opinion labels the "garbage" comment as a mere reference to petitioner's testimony.

Appendix, 16. This is not so as a reading of the record demonstrates. It also characterizes the reference to "other" damning but unstated evidence about petitioner as ambiguous. Appendix, 16-17. This too is not a reasonable reading of the passage. A reasonable jury would hear these statements about petitioner as attacking him for having the audacity to pronounce his innocence on the stand before the jury and the deceased's family.

Analysis of the prosecutor's words shows exactly to whom he referred: "But [for him] to get up here and [for him to] get on the stand and [for him to] look at you people and [for him to] tell you that story that he told you in front of the [deceased's] family, **this piece of garbage,** [his] making up every little bit of it, he's the biggest liar you've ever encountered."

Every word prior to and after the "garbage" epithet castigates petitioner himself for taking the stand and testifying in front of the jury and deceased's family. This meaning is conclusively shown by the very next phrase in which the prosecutor states, "**he's** a lot worse than that" [*i.e.*, worse than the biggest liar]. It is petitioner who is referred to as worse than garbage and a liar, not his testimony. The prosecutor then informs the jury that petitioner is worse than this, and he has information he won't share with them explicitly as to what he knows, but they can imagine what he would tell them.

As with jury instructions, the question is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the constitution. *E.g.*, Estelle v. McGuire, 502 U.S. 62, 72 (1991). This did. The only reasonable meaning of the reference to other unstated damning

evidence (and evidently, too horrible to even articulate) was, as the original panel majority found, that the prosecutor knew of other damning matter that he would not share with the jurors, a theme the Detar tape and transcript also contained when Detar stated to petitioner that there was other unstated evidence showing his guilt. Both the prosecutor's and the officer's statements were false. *See* Appendix, 22, dissenting opinion: "this other 'evidence' was not introduced at trial because it did not exist." There was no other evidence, but the jury was given the exact opposite message by the police and the prosecutor, officials whom jurors would normally believe to be knowledgeable and trustworthy and who would not mislead them – as they most certainly did. *See* Berger v. U.S. 295 U.S. 78 (1935) (references to personal knowledge of facts for which there is no evidence is misconduct).

The majority opinion's conclusion about the "other" unstated matters was that the prosecutor's reference was probably, albeit ambiguously, about petitioner having committed a "rape murder" – the offense for which he was charged and on trial. Appendix, 16-17. This again cannot withstand analysis. Having made the formal rape-murder charge and then adduced weeks of evidence and given argument on that issue, it is unreasonable to believe that at the end of the case, the prosecutor suddenly became shy about stating the charge against petitioner. The record says otherwise: In his opening statement, the prosecutor stated he would prove petitioner committed rape-felony murder. RT 681. In final argument, he argued rape felony-murder (RT 2206), and that, "This is a date rape situation." RT 2286. It makes no sense to construct a harmless

meaning out of this context when the context so clearly contradicts it. The prosecutor did not suddenly become shy about stating rape-murder as the charge or the judgment he sought. This was a reference to other unstated matter, which did not exist, to cause the jury to believe there were other crimes petitioner committed.

There was yet another unwarranted and highly prejudicial prosecutorial statement. The prosecutor told the jury that the fact that the defense attorney briefly mentioned in his defense argument the availability of a lesser included offense instructions meant that he knew his client was guilty: "The reason he talked about involuntary manslaughter is because he knows that you know that the defendant is guilty." RT 2280; ER 322.

The defense attorney's talking to the jury about lesser instructions -- petitioner had objected lessers being given during the instruction conference (RT 2086) -- cannot be turned into a prosecutor's weapon of argument that the defense attorney "knows" his client is guilty. *E.g.*, People v. Thompson, 753 P.2d 37, 53 fn. 19 (Cal. 1988) (collecting cases); Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983) (prosecutor's baseless condemnation of the defense as fabricated held prejudicial.) This statement told the jury the defense of innocence was but a sham because even the defense attorney knew petitioner was guilty.

These prejudicial prosecution misstatements warranted an objection by a reasonable attorney. Kimmelman v. Morrison, *supra (*failure to file appropriate discovery motion held ineffective); Sager v. Maass, 84 F.3d 1212 (9th Cir. 1996), *affirming* for the reasons stated in the district court opinion at 907 F.Supp. 1412, 1420 (D.Or. 1995)(a competent defense

attorney would object to irrelevant, inflammatory references concerning his client on a police tape recording.) The prejudice from not objecting is obvious: this jury was told by the prosecutor in argument there was unstated other evidence against petitioner and that petitioner's own attorney believed him guilty. Combined with the tape and transcript, which also alluded to other unstated (but nonexistent) evidence, the petitioner was actually prejudiced.

In Strickland v. Washington, 466 U.S. 668, 698 (1984), the Court described an ineffective assistance of counsel claim as an "attack on the fundamental fairness" of the trial. The Court stated that "fundamental fairness is the central concern of the writ of habeas corpus." Id. *See also* Mak v. Blodgett, 970 F.2d 614, 622 (9th Cir. 1992)(ineffective assistance plus other errors in penalty phase -- the erroneous exclusion of mitigating evidence and instructional error -- warranted habeas relief.)

In this case, the evidence of guilt was "far from overwhelming." Dissenting *en banc* opinion, Appendix, 24. The cumulative prejudicial effect of the constitutional violations cannot be denied. *See* Berger v. U.S. *supra* at 79. Certiorari should be granted to insure the Sixth Amendment right to counsel includes counsel who reacts to prejudicial misconduct by the State by objecting.

3. A SUSPECT IS IN CUSTODY FOR MIRANDA ADMONITION PURPOSES WHEN HE IS DUPED INTO AGREEING TO BE TAKEN BY THE POLICE TO PROSECUTION OFFICES MILES FROM HIS HOME OSTENSIBLY FOR A CHAT AND UPDATE ON CASE DEVELOPMENTS, AND THEN IS CONFRONTED WITH ACCUSATIONS OF MURDER AND NOTIFIED THAT FUTURE COURT PROCEEDINGS WILL OCCUR AND THAT HE HAS TO "GET SOMETHING GOING" FOR HIMSELF.

This issue relates to the introduction of the tape recorded statements of the interrogating officers during an interview of petitioner, as set forth in reason one for the grant of *certiorari.* The officers had made an unannounced visit to petitioner's home, met him at his car as he was about to drive to the hospital where he was a new resident, and drove him to a prosecutor's office for a "chat" about the investigation. This issue turns on the Miranda v. Arizona, 384 U.S. 436, 448 (1966), definition of "custody." The Court of Appeals approved the federal district court ruling on this issue – rejecting that there was any custody and therefore that no Miranda warnings were required -- and did so merely by stating it was "without merit." Appendix, 17.

Simply put, no reasonable person, unwarned of his constitutional rights, would believe himself free to leave the prosecution office after: a) being duped into agreeing to be taken by the police to prosecution offices miles from his home ostensibly for a "chat" in which he would be updated on case developments; b) being told while at the prosecutor's office that he took a woman's life by using chloroform in order to have sex with her; c) being told there was no other explanation for the

death other than that he did it, d) being told that other unidentified people said he was responsible, e) being told that all the scientific tests were performed and that the evidence was conclusive, and f) being told that at his future court proceedings the judge and jury would not believe his claims of innocence; thus, he needed to "get something good going" because his protestations of innocence to the police were not doing that. See Appendix, 21, dissenting opinion quoting from taped transcript played and provided jury in transcript form during deliberations.

The state and federal courts in this case ruled that yes, the reasonable suspect would feel free to walk out of the prosecutor's office under these circumstances. But it is patently and objectively reasonable that a suspect in this context would believe he is ***not*** free to go, and all statements taken before a Miranda rights admonition would be taken in violation of the U.S. Constitution's Fifth Amendment guarantee. Dickerson v. U.S., __ U.S. __, 120 S. Ct. 2326 (2000). As noted, the federal district court and the court of appeal disagreed. Appendix, 17.

This issue is a recurring one in California because for years law enforcement has been trained that taking statements "outside" Miranda was perfectly legal. Toying with the concept of "custody" has been one means of furthering this tactic. By misusing this court's decision in Harris v. New York, 401 U.S. 222 (1971) (holding that a good faith Miranda-violation still permits the suspect's statements to be used to impeach the defendant's trial testimony), the police put themselves in a win-win situation by ignoring Miranda's requirements no matter what the court's rule later. If Miranda is deemed violated and suppression ordered, then at least the defendant will be kept off

the stand or suffer impeachment with any Miranda-violative statements. If the tactic produces no suppression ruling, so much the better. *See, e.g,* People v. Peevy,17 Cal.4th 1184 (1998) (intentional Miranda violation warrants only suppression during case-in-chief and impeachment still permitted); People v. Bey, 21 Cal.App.4th 1623 (1993); People v. Baker, 220 Cal.App.3d 574, 576 (1990). *See also* California Attorneys for Criminal Justice v. Butts, 195 F.3d 1039 (9th Cir. 1999), *cert denied sub nom.* Butts v. McNally, 147 L. Ed. 2d 983 (holding such violations to be also violations of Title 42 U.S.C. 1983.)

Apart from this official compliance problem, the specific issue of "custody" is involved in this case and, of course, has been the subject of opinions in this Court. *See* Stansbury v. California, 511 U.S. 318, 324 (1994) (officers subjective beliefs not relevant to custody issue unless communicated); Thompson v. Keohane, 516 U.S. 99 (1995) (*de novo* federal habeas corpus required of the custody issue); Oregon v. Mathiason, 429 U.S. 492, 493-494 (1977) (no custody where officer called parolee at his home and asked to meet him at a state patrol office two blocks from the parolee's home, and there told parolee he had committed a burglary prompting a confession.)

Petitioner was the suspect in the case when officers traveled from California to New Jersey to interrogate him and conduct searches of his apartment, car and work locker. He was going to be formally arrested, but the detective in charge, Detar, did not make an arrest on October 23, 1991, the date of the interrogation, because informing the petitioner of his rights might well have cost him a potentially useful damning statement. Ironically, petitioner made no incriminating statements. The

State nevertheless introduced the tape recording for the ostensible purpose of showing that petitioner had no explanation for how his friend died -- a statement he had given months earlier on the date of her death. RT 740, 761. He also testified at the trial and denied any involvement in her death or why she expired. RT 1687, 1779-80.

The clear prejudice from the introduction of the tape recorded statement was *the officer's* long narratives of false information (*e.g.*, other unstated people said petitioner was responsible, the evidence was conclusive, all scientific tests had been performed). He continually added his own repeated opinion of petitioner's guilt and said that the trial judge and jury would believe petitioner to be a liar.

No reasonable person in petitioner's position would feel free to leave the prosecutor's office after these statements. Petitioner, a medical doctor, had been surprised by the appearance of police from California in front of his apartment in New Jersey at 7:22 a.m. that morning as he was about to go to the hospital to perform his medical duties; he was asked to go downtown for a "chat" where the officers would "...tell [him]... everything that's happened and we'll get it all taken care" of (CT 75), and then was driven miles away by the police to a prosecutor's office. He was assured that he was "an important witness." CT 86. At the prosecutor's office, he was informed: "If I told you someone said you were responsible for her death, what would you say?" CT 99. "And a, pretty much, we've determined that you are responsible for her death.... [¶] There's no question. The evidence is conclusive...." CT 100.

Then the inquisitors stated, "Now, we need to get

something going for you." CT 101. What would this information tell a reasonable human being who has just been surprised by an officer's accusation that he committed an unlawful homicide and would face court proceedings in which a judge and jury would disbelieve his claim of innocence? The answer should have been self-evident to the court's below.

The refrain of the State inquisitors continued that petitioner needed to "get something going" for himself. CT 101-102: ("So now this is the opportunity for you to come clean, for you to do something good for you to say ... [sound of sigh], guys I need to tell you something.") Why? Because the officer tells him: "you caused her death." CT 102.

After being tricked to come "downtown" for a chat concerning an information update, and then, once in the prosecutor's office, accused of murder and that he needed to "get something going" because the police did not believe his exculpatory statements, only the most brazen would feel free to leave. The definition of custody is uncomplicated: a reasonable belief in official restraint such that one is not free to leave. Even the most daring legal interpreter of this court's Miranda-custody jurisprudence would be surprised to learn that on the facts of this interrogation, a reasonable person would feel free to leave especially after the officers started posing questions along the lines of "what are the judge and jury going to say?" CT 103-104, 107. Obviously, petitioner was going to be formally arrested for murder in that the officers were already positing how the judge and jury would react to his claims of innocence.

A communication of a conclusive belief that a suspect is guilty of murder has to heavily impact the custody equation

because it obviously affects a reasonable individual's assessment of his freedom of action. "[I]t is nevertheless true that close and persistent questioning, accompanied by a warning as to the provisions of a criminal statute and an evident belief by the interrogating officers that the suspect is lying, may reasonably induce in a suspect the belief that he is no longer free to go about his business without significant restraint." U.S. v. Bekowies, 432 F.2d 8, 13 (9th Cir. 1970). *See also* Wilson v. Superior Court, 34 Cal.3d 777, 790 (1983) ("Common sense suggests to us that in such a situation, an ordinary citizen, confronted by a narcotics agent who has just told him that he has information that the citizen is carrying a lot of drugs, would not feel at liberty simply to walk away from the officer.")

The courts below placed much reliance on the officer's statement to petitioner at the outset of what was initially characterized as a "chat" that he was free to go. This statement was made while the police ruse of the "chat" was still in play; it was made but once at the outset of the interview. No such comments were made after the officers' true agenda unfolded and the accusations of murder commenced. *See* U.S. v. Lee, 699 F.2d 466, 467 (9th Cir. 1982) (being told he was "free to go" at outset of interview in a car in front of suspect's home still resulted in "custody" after officers then confronted the defendant with facts and made exhortations that he tell the truth).

This Court's rulings state that the determinative factor for the custody issue focuses on the time of the interrogation. The fact that petitioner was later allowed to leave after the interrogation (only to be arrested later) does not change the analysis of what a reasonable person would feel at the time of the

interrogation. An interrogation can be custodial even if the police decide to delay the arrest. *See* U.S. v. Beraun-Panez, 812 F.2d 578 (9th Cir. 1987) (interrogation statements suppressed even though arrest took place three months later).

The custody question still revolves around the totality of the circumstances. Thompson v. Keohane, 516 U.S. 99, 112 n. 11 (1995). One circumstance was that petitioner was taken from his daily regimen (going to work) and whisked away in a police car to a prosecutor's office miles away. That alone weighs heavily in support of a custody finding.

Miranda itself notes the police objective in taking a suspect downtown: "The officers are told by the manuals that the 'principal psychological factor contributing to a successful interrogation is privacy-being alone with the person under interrogation.' The efficacy of this tactic has been explained as follows: 'If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law.'" Miranda, *supra* at 449-450. [Footnote omitted.][6]

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[6] *See also* U.S. v. Wauneka, 770 F.2d 1434, 1439 (9th Cir.
(continued...)

The tables were turned on petitioner with the announcement by the interrogating officers at the prosecutor's office that petitioner had committed a rape and unlawful homicide, and that he needed to get something going for himself for later review in court. The petitioner's interrogators did not respect petitioner's answers, but continually denigrated them and informed him that he needed to "get something good going for" himself. Appendix, 21.

In Thompson v. Keohane, *supra*, this Court held that Mr. Thompson's case should be remanded for reconsideration by the lower federal courts which had mistakenly applied a presumption of correctness to the state findings of non-custody. In so ruling, the opinion held that the custody issue was to be reviewed *de novo*. The dissent held that even if *de novo* review were applied, as a matter of law, there could be no finding of custody on the facts presented.

Petitioner's case is far stronger for a custody finding than that in Thompson v. Keohane, *supra*. Thompson drove himself to the location of the police interview; in petitioner's case, petitioner was taken by police (using a ruse to get consent for the trip) miles away from his home to a prosecutor's office. Petitioner's interrogation was far more accusatory than in Thompson although both were the prime suspects in each case.

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[6](...continued)
1985) ("Wauneka had no means of transportation, and he was never offered an opportunity to leave the BIA office prior to his confession. A reasonable innocent person in such circumstances probably would have concluded that he was not free to leave. *See* U.S. v. Lee, 699 F.2d 466, 468 (9th Cir. 1982).")

The officers assured Thompson that he was free to leave throughout the interview; in petitioner's case, such a statement was made at the outset of what was promised to be a chat to update petitioner on the investigation, and was not mentioned again as the conversation went from a "chat" to an interrogation characterized by repeated accusations of homicide and inevitable future court proceedings.

In Oregon v. Mathiason, *supra,* this Court stated that the *brief* questioning of the suspect in the parole office (just minutes prior to the rights advisal) did not *per se* require a restraint of freedom of movement finding to amount to custody. The custody question still revolves around the factor-analysis of the totality of the circumstances including (1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning.

Applying these factors here, custody is clear: (1) the site was in a prosecutor's office miles from petitioner's home and where he had been driven by the police; (2) the focus could not have been more clearly on petitioner as he was told he was responsible for the death of another human being; (3) the objective criteria of arrest were present in that petitioner was alone in a prosecutor's office being told he committed an unlawful homicide and that there would be future court proceedings in which he would have to "get something going for himself;" (4) the length and form of the questioning were prolonged, repetitive, and accusatory. In the words of the trial court, "the questioning became very pointed and accusatory...." RT 78.

In Stansbury v. California, 511 U.S. 318, 324 (1994), the

totality of evidence criteria were controlling. The court said that an officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question whether the individual is in custody. But here, the officer's stated beliefs clearly conveyed to the suspect have to bear upon the custody issue. *See* U.S. v. Beraun-Panez, *supra* at 580-81 (repeated accusations of guilt suggest custody); U.S. v. Bekowies, 432 F.2d 8, 13 (9th Cir. 1970) (accord).

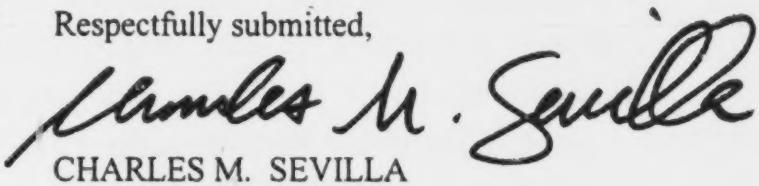
All of these factors weigh in favor of a custody finding, including the fact that after being badgered with accusations of guilt and that the judge and jury would not believe him when he was on trial, petitioner finally, on his own, invoked his right to silence and counsel.

In sum, this Court's logical approach to the custody calculus was not followed in petitioner's case. The California courts' concept of "custody," as approved by the federal court in this case, is wholly unrealistic and falls constitutionally short of the objective standard set by this Court. Certiorari should be granted to re-enforce the concept that "custody" occurs when the police attempt to avoid their duty to admonish a defendant of his constitutional rights by ruses, gamesmanship or outright disobedience to the rule of law.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the Court grant *certiorari* on the three issues presented.

December 6, 2000 Respectfully submitted,



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APPENDIX: OPINION OF THE EN BANC NINTH CIRCUIT COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Samson Dubria,
Petitioner-Appellant,

v.

G.A. Smith, Warden,
Respondent-Appellee.

No. 98-55914
D.C. No.
CV-96-00657-JK
(AJB)

OPINION

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, Chief District Judge, Presiding

Argued and Submitted February 4, 1999
Pasadena, California

Opinion filed November 19, 1999
Order Granting Rehearing En Banc
Filed March 9, 2000

Argued and Submitted En Banc
June 22, 2000--San Francisco, California

Filed September 11, 2000

Before: Procter Hug, Jr., Chief Judge, Mary M. Schroeder, Harry Pregerson, Ferdinand F. Fernandez, Pamela Ann Rymer, Thomas G. Nelson, Andrew J. Kleinfeld, Michael Daly Hawkins, Sidney R. Thomas, Susan P. Graber, and Ronald M. Gould,
Circuit Judges.

Opinion by Judge Hawkins
Dissent by Judge Pregerson.

COUNSEL

Charles M. Sevilla, Cleary & Sevilla, San Diego, California for the petitioner-appellant.

Frederick R. Millar, Jr., Office of the State Attorney General, San Diego, California, for the respondent-appellee.

OPINION:

HAWKINS, Circuit Judge:

Dr. Samson Dubria ("Dubria"), a California state prisoner, appeals the district court's denial of his federal petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter was heard originally before a three-judge panel of this court. We accepted the case for en banc review and now affirm the district court. Our jurisdiction is pursuant to 28 U.S.C. § 1291.

BACKGROUND

Dubria was found guilty following a jury trial of first degree murder, rape by the use of drugs, and administering a drug in order to enable and assist himself to commit a felony. Dubria was given a mandatory sentence of life in prison without the possibility of parole. Following the denial of his consolidated direct and collateral appeals in state court, Dubria sought habeas relief in district court.

The relevant events began in 1990 when Dubria became friends with Jennifer Klapper ("Klapper") while the two were co-workers at an Ohio hospital. Their relationship was not romantic. Klapper had stated that she was not physically attracted to Dubria and, at

the time of her death, she was romantically involved with another man with whom she was discussing marriage. In the spring of 1991, Dubria invited Klapper to attend his class reunion in California. Klapper was a television and movie fan and did not have the financial means to take a trip to California on her own. She also expressed reservations about the invitation. She told a friend that she felt uncomfortable about going on the trip because she did not know what Dubria expected from her. She also told her boyfriend that she did not want to be away from him. Klapper's sister overheard a telephone conversation in which Klapper told Dubria that their relationship was platonic and that she had a boyfriend. Further, she told Dubria that if he expected to have physical relations while on the trip, she would have to cancel her plans to go.

Dubria flew to California alone and in advance of Klapper and then picked her up at the airport several days later. The pair spent the next few days touring Southern California, spending their evenings at the home of Dubria's parents and sleeping in separate rooms. On August 15, 1991, after watching a taping of the Johnny Carson Show, they planned on camping overnight at the San Elijo State Beach Campground between Los Angeles and San Diego. Instead of camping out, the pair checked into the Allstar Inn in Carlsbad, California.

At about 3:09 a.m., Carlsbad police responded to a 911 call at the Allstar Inn. Klapper was lying unconscious on the bed closest to the door. She had no pulse and was not breathing. Dubria and a police officer administered CPR. Firefighters and paramedics arrived shortly thereafter and were able to restore some electrical activity in Klapper's heart, but not a normal beat. Neither the police nor any of the emergency personnel smelled a chemical odor in the room. Klapper was immediately transferred to a local hospital where further attempts to revive her were unavailing.

Emergency room physicians pronounced Klapper dead at 3:52 a.m., but were unable to determine a cause of death.

Several hours after her death, Klapper's body was examined by a coroner's investigator, who noticed that Klapper was missing an earring in her left ear, and the lycra pants she was wearing were on inside out. The investigator also noticed scratches on her face, including a half-moon scratch on her left cheek. The investigator examined the room at the Allstar Inn and in the trash can found a beer can, a carton of fuzzy navel mixed drink, and a styrofoam cup containing a yellowish liquid. None of the items had any odor except that of alcohol, and they were not preserved.

Dubria willingly spoke with Carlsbad police officers three times during the early morning of August 16, relating essentially the same story each time: he and Klapper had planned on staying at a campsite that night and when their plans to stay at the campsite fell through, they decided to get a motel room. They arrived at the Inn at about 11:30 p.m. He drank a beer and a mixed drink and Klapper had a few sips of the mixed drink. Klapper moved over on the bed she was lying on and signaled for Dubria to join her. He put his arm around her and they cuddled in the bed. They talked, kissed, and eventually had sex. He stated that, before they had intercourse, he asked her if she was using any birth control and she told him that she was taking birth control pills. After they had intercourse, Klapper went to the bathroom, then Dubria went to the bathroom, and they went to sleep in the same bed.

Dubria stated that, after Klapper fell asleep, she tossed and turned. At about 3:00 a.m., he awoke to go to the bathroom. While in the bathroom, he heard a "thud" and a moan and, when he returned, he found Klapper on the floor. She was not breathing and had no pulse. He administered CPR for about five minutes. He then panicked and, instead of calling 911 from the room, he

ran out of the room for help. The person working in the motel office told him to call 911 from his room. He ran back to the room, found himself locked out, ran back to the motel office, got a spare key, and ran back to the room to call 911. The police arrived a few minutes later. Dubria, who had been with Klapper almost continuously that day and night, stated that he had no idea why she died.

After Dubria returned to the medical facility where he was working in New Jersey, an autopsy was performed on Klapper's body. The examiner, forensic pathologist Dr. Leena Jariwala, found some cuts and abrasions on Klapper's right eyelid, her right chin, her left cheek, and the tip of her nose. Dr. Jariwala concluded that these injuries were inflicted before Klapper's heart stopped beating. Dr. Jariwala and the emergency personnel also concluded that these injuries were inconsistent with the efforts of emergency personnel to revive her on the night of her death. Dr. Jariwala's examination also revealed that Klapper had sexual intercourse relatively close to the time of her death. After completing the autopsy, Dr. Jariwala could find no cause of death.

Toxicological tests were performed and the only anomalous result was a heightened level of chloroform in Klapper's blood, liver tissue, and gastric organs. Dr. Jariwala concluded that the cause of death was chloroform intoxication.

On October 23, 1991, Carlsbad detectives visited Dubria at his New Jersey home. They interviewed him at a nearby office. The officers told Dubria that they believed he had accidently murdered Klapper when he administered chloroform in order to rape her. Dubria stuck to his story that he had no idea how Klapper had died and specifically denied trying to rape her or playing any role in her death. The officers did not arrest Dubria that day but later charged him with Klapper's rape and murder.

At trial, Dr. Lucien Morris, a state expert with extensive knowledge of chloroform, explained that chloroform is an extremely potent and dangerous anesthetic. He stated that the standard method for administration of chloroform was to place one drop on a cloth over a patient's face, return in one minute and place two drops on the cloth, then return in another minute and again double the dose and so on until the desired level of anesthesia is reached. This method avoids sudden exposure to concentrations of chloroform, which can be lethal. Chloroform is now seldom used because the margin of error between enough chloroform and too much is very small.

Dr. Morris noted that death from chloroform inhalation can occur when a small amount of chloroform is inhaled suddenly. The concentration of chloroform in the blood rises quickly and disrupts the heart. The amount of chloroform that can cause death under these circumstances is very small. Dr. Morris also noted the dangers of administering chloroform to a sleeping person. He explained that, if the person awakened and became frightened, the resulting release of adrenaline could interact adversely with the chloroform. Dr. Morris concluded that Klapper had died from a sudden inhalation of a small dose of chloroform.

Dr. Morris also stated that, although chloroform has a strong odor, the odor does not persist. He testified, that assuming Dubria administered chloroform to Klapper in the motel room, it would have been possible for the smell to have dissipated before the police and emergency personnel arrived.

Dr. Gregory Schwartz, the defense medical expert and an emergency room physician, agreed with Dr. Morris about the dangers of chloroform. Dr. Schwartz concluded that Klapper died after having ingested, rather than inhaled, chloroform. He noted that chloroform's use as a recreational drug is on the rise,

although it is still relatively rare. He thought Klapper had overdosed on chloroform. He stated that, if she had inhaled chloroform, the odor would not have dissipated before the police and emergency room personnel arrived because the smell would persist in a closed room for eight to twelve hours. He noted that, if Klapper had ingested the chloroform, less vapor would have evaporated and there would be less of a smell. He conceded, however, that one could get rid of the smell of chloroform quickly. Dr. Schwartz also believed that the injuries to Klapper's face were consistent with attempts to revive her.

Dubria took the stand in his own defense. He stated that his relationship with Klapper was not platonic. Before he and Klapper had gone to California, he had been on several formal dates with her. He had been attracted to her since early in their relationship and he had first kissed and cuddled with her in April 1991, and then again in May 1991 after going bowling. Dubria's testimony about the night of Klapper's death was consistent with the story that he had repeated to police immediately after Klapper's death and at the later interview in New Jersey.

The jury convicted Dubria of first degree murder, rape by the use of drugs, and administering a drug in order to enable and assist himself to commit a felony. On the murder charge, the jury also found the special circumstance of rape to be true, and Dubria was sentenced to life in prison without the possibility of parole. Dubria appealed to the California Court of Appeal. His direct appeal and state habeas petition were consolidated and both were denied in a written unpublished opinion on July 18, 1995. His petition for review by the California Supreme Court was denied without opinion on October 19, 1995, and his petition for a writ of certiorari to the United State Supreme Court was denied on February 20, 1996, Dubria v. California, 516 U.S. 1118, 133 L. Ed. 2d 852, 116 S. Ct. 923 (1996).

Dubria filed the instant habeas petition in federal district court, which denied the petition on the merits. He timely filed an appeal and a three-judge panel reversed the district court, see Dubria v. *Smith, 197 F.3d 390 (9th Cir. 1999). We granted the state's* petition for en banc review.

STANDARD OF REVIEW

We review the district court's decision to grant or deny habeas relief de novo. See McNab v. Kok, 170 F.3d 1246, 1247 (9th Cir. 1999) (per curiam). State court findings of fact are given a presumption of correctness. See 28 U.S.C. § 2254(e)(1) (1996); Jeffries v. Wood, 114 F.3d 1484, 1499-1500 (9th Cir. 1997) (en banc). The district court's factual findings are reviewed for clear error. See Houston v. Roe, 177 F.3d 901, 905 (9th Cir. 1999). Claims of ineffective assistance of counsel are mixed questions of law and fact and are reviewed de novo. See Crotts v. Smith, 73 F.3d 861, 864 (9th Cir. 1996), superseded by statute as stated in Van Tran v. Lindsey, 212 F.3d 1143, 2000 WL 622070 (9th Cir. May 16, 2000) (to be reported at 212 F.3d 1143). n1

ANALYSIS

1. The Pre-Arrest Interview

Dubria claims constitutional error from the admission of the unredacted tape and transcript of his New Jersey interview by police detectives. During this interview, the detectives, in

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n1 Dubria filed his petition before the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Therefore, AEDPA's changes to our standard of review do not apply here. See Lindh v. Murphy, 521 U.S. 320, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997).

particular Detective Detar, challenged Dubria about his explanation of the events and repeatedly told him that no judge or jury would believe him if he stuck to his story. The state claims that Dubria procedurally defaulted on this issue by failing to make a contemporaneous objection at trial. The state also argues in the alternative that, even if there is no procedural bar, the district court did not commit error in admitting the unredacted tapes.

We conclude that we may examine the merits of this issue because defense counsel made a sufficiently broad objection at trial and because the state appears to have waived any procedural bar by failing to raise the issue in its response to the habeas petition, see United States v. Barron, 172 F.3d 1153, 1156 (9th Cir. 1999) (en banc). "Because there are no extraordinary circumstances present in this case which would suggest that justice would be served by overlooking the government's omission," id. at 1156-57, we conclude that even if defense counsel's objection was not adequate, the State waived its right to claim procedural default.

Reaching the merits of this claim, we conclude that Dubria cannot meet the standard that the admission of the tape and transcript "so fatally infected the proceedings as to render them fundamentally unfair." Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991). "'Federal habeas corpus relief does not lie for errors of state law.'" Estelle v. McGuire, 502 U.S. 62, 67, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991) (quoting Lewis v. Jeffers, 497 U.S. 764, 780, 111 L. Ed. 2d 606, 110 S. Ct. 3092 (1990)). Therefore, we cannot grant habeas relief upon reexamination of state-court determinations of questions of state law; we can grant relief only when the conviction "violates the Constitution, laws, or treaties of the United States." 502 U.S. at 68.

The question before us is whether admission of the unredacted

tape and transcript violated Dubria's constitutional right to due process. Dubria acknowledges that the tape and transcript were admissible for a limited purpose - to show that, when confronted with the toxicological tests, Dubria could not and did not explain why a woman he was continuously alone with for the prior 24 hours suddenly turned up dead from chloroform intoxication. When confronted with the toxicological tests, Dubria maintained that he was not involved in Klapper's death. He also suggested that maybe Klapper took the chloroform herself or that both of them may have been exposed to chloroform when they drove behind a chemical truck.

Dubria claims instead that certain portions of the tape and transcript should have been redacted. He argues that Detective Detar's comments and questions contained statements of disbelief of Dubria's story, opinions concerning Dubria's guilt, elaborations of the police theory of Klapper's death, and references to Dubria's involvement in the crime. Viewed in its entirety, however, the tape and transcript show what the state appellate courts quite properly described as an "unremarkable interview." n2 The questions and comments by Detective Detar placed Dubria's

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n2 The California Court of Appeal concluded that it found the interview generally unremarkable. There is no doubt the officers were accusatory and suggested in a variety of ways they did not believe appellant. The jury would certainly understand this to be the police position and would give to it no more weight than they would the fact appellant was charged by the prosecutor with murder or that the prosecutor clearly also disbelieved appellant. . . . The officers' comments, however, suggested no more than what the People proposed to prove at trial. There was nothing particularly damning in the officers' statements or suggestions of evidence or theories that the People did not present or offer at trial.

answers in context, much like a prosecutor's questions at trial. There was nothing in Detective Detar's statements that suggested evidence or theories of the case that were not presented at trial.

Nor do we find conclusive the argument that the jury impermissibly gave the comments added weight because they were made by a law enforcement officer. Although we have cautioned that testimony of law enforcement officers "'often carries an aura of special reliability and trustworthiness,'" United States v. Gutierrez, 995 F.2d 169, 172 (9th Cir. 1993) (quoting United States v. Espinosa, 827 F.2d 604, 613 (9th Cir. 1987)), we examine officers' statements in context to determine whether they fundamentally affect the fairness of the trial, see id. (no error in introduction of evidence). n3 Here, Detective Detar's statements were questions in a pre-trial interview that gave context to Dubria's answers. They were not the types of statements that carry any special aura of reliability. Cf. Gutierrez, 995 F.2d at 172 (district court did not abuse discretion in admitting officer's testimony in court that defendant's behavior was "furtive"); Espinosa, 827 F.2d at 612 (officer's expert testimony in court that defendant acted in accordance with usual criminal modus operandi was admissible).

Furthermore, even if it was error to admit the tapes and transcripts without redacting Detective Detar's statements, any

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n3 We do not assume that the opinions of an investigating officer are presumptively prejudicial. Cf. United States v. Harber, 53 F.3d 236, 238, 240-41 (9th Cir. 1995) (presuming prejudice when law enforcement officer's report, introduced into evidence only for identification and to refresh officer's memory as to certain facts, which included statements that officer thought defendant was guilty, was mistakenly given to the jury for their deliberations and was read by them).

error was cured by the judge's two cautionary instructions. In response to an objection by defense counsel, the judge told the jury:

Ladies and gentlemen, you should view the questions and answers in the same way that you view the questions and answers in the courtroom. In other words, the questions are only pertinent as they may explain what the answers themselves are. You are not to assume as true anything that Detective Detar says in his questions. The questions are only pertinent as they give meaning to the answers.

Later, the judge repeated to the jury:

Again I want to caution you, too, you are not to consider any of the statements that Detective Detar makes for the truth of the matters asserted in those statements. Those are just questions or statements in the forms - questions in the form of statements. They are not to be considered for the truth, they are only to be considered as how they may give meaning to the answers.

Any impression that the jury may have had that it could consider Detective Detar's statements to be true was specifically and timely corrected by the trial judge. See Donnelly v. DeChristoforo, 416 U.S. 637, 644, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974). Ordinarily, a cautionary instruction is presumed to have cured prejudicial impact. See United States v. Merino-Balderrama, 146 F.3d 758, 764 (9th Cir. 1998).

This is not a case in which the statements at issue are so clearly prejudicial that a curative instruction could not mitigate their effect. Dubria attempts to draw an analogy to Bruton v. United States, 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968), in which the Supreme Court concluded that a curative instruction

was insufficient to mitigate the prejudicial effect of a co-defendant's confession that implicated the appellant. In that case, the Court held that the jury could not perform the overwhelming task of considering the confession in determining the guilt of the co-defendant and then ignoring it when determining the guilt of the appellant. n4 See id. at 131. Here, in contrast, the jury had to simply do what it is asked to do all the time - consider the questions posed by Detective Detar as mere questions and not as evidence.

Further, the Court in Bruton based its holding in part on the fact that the co-defendant never testified at trial and, therefore, that the appellant was denied his constitutional right of confrontation. See id. at 128. Here, there was no denial of that right, as both Detective Detar and Dubria took the stand and could be questioned about the interview.

Finally, while it is clear that, under California law, tapes should be redacted to remove material that is either impermissible or would unfairly prejudice the defense, see People v. Sanders, 75 Cal. App. 3d 501, 508, 142 Cal. Rptr. 227 (1977), "not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice.'" Donnelly, 416 U.S. at 642 (quoting Lisenba v. California, 314 U.S. 219, 236, 86 L. Ed. 166, 62 S. Ct. 280 (1941)). We conclude that admission of these comments and statements did not violate Dubria's fundamental right to due process.

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n4 The facts of Bruton were even more compelling, in fact, because the co-defendant's conviction was reversed on the ground that his confessions were inadmissible against him, and on retrial he was acquitted. See id. at 133 n.9.

2. Prosecutor's Closing Argument/Ineffective Assistance of Counsel

While en banc review of this appeal was pending, the Supreme Court decided Slack v. McDaniel, 146 L. Ed. 2d 542, 120 S. Ct. 1595, 1600-01 (2000). Slack held that AEDPA governs the right to appeal a district court's dismissal of a habeas petition, like Dubria's, pending on AEDPA's effective date, April 24, 1996. Id.

AEDPA amended 28 U.S.C. § 2253, which now provides, in pertinent part, that "unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals . . . . The certificate of appealability . . . shall indicate which specific issue or issues satisfy the showing requirement." Slack held that the court of appeals should have treated the petitioner's notice of appeal as an application for a certificate of appealability ("COA"). It then examined the issues to determine if any met the showing requirement. See 120 S. Ct. at 1603. If Dubria had not filed a motion for a COA in the district court, we could treat his notice of appeal as a motion for a COA, and Slack would not change our ability to consider any issue we concluded met the showing requirement. See Schell v. Witek, 218 F.3d 1017, at n.4 (9th Cir. 2000) (en banc). Dubria, however, did file a motion for a COA in the district court and the district court explicitly refused to certify for appeal the issue of trial counsel's failure to object to statements made by the prosecutor in closing argument that Dubria was a liar, that he made up a story, and that

the story was "garbage." n5

The original panel, ruling without the benefit of Slack, followed our precedent, and that of seven other circuits, and held that the district court improperly applied the COA procedure because Dubria's petition was filed prior to AEDPA's effective date. The panel concluded that it was not limited by the COA and could address all issues on appeal. The panel relied in part on defense counsel's failure to object to the "garbage" statement made by the prosecutor to conclude that defense counsel provided ineffective assistance.

Considering this issue on the merits, however, we conclude that defense counsel did not provide ineffective assistance. Dubria's claim arises out of trial counsel's failure to object to the following portion of the prosecutor's closing argument:

But to get up here and get on the stand and look at you people and tell you the story that he told you in front of the family, this piece of garbage, making up every little bit of it, he's the biggest liar you've ever encountered. He's worse than that. I'm not going to tell you. You can imagine some of the things I could tell you what he really is. I'm not going to tell you, because you know. You know in your hearts what else.

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n5 Circuit Rule 22-1, effective January 1, 1999, requires that a petitioner file a motion in the court of appeals to expand a COA where the district court partially granted the COA. The parties neither briefed nor argued on appeal before the original panel or before the en banc court whether Circuit Rule 22-1 precludes review of the "garbage" issue, see United States v. Zuno-Arce, 209 F.3d 1095, 1099-1100 (9th Cir. 2000), and we decline to reach the issue here.

To establish ineffective assistance of counsel, Dubria would have to show that his trial counsel's failure to object to these statements fell outside the wide range of professionally competent assistance and that this deficient performance prejudiced his defense. See Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

Both the California Court of Appeal and the district court found that the "piece of garbage" reference, when read in context, referred to Dubria's story, not to Dubria himself. We see no reason to disagree. Cf. Williams v. Borg, 139 F.3d 737, 744-45 (9th Cir. 1998) (prosecutor's reference to defense argument as "trash" not improper). Furthermore, even assuming that "piece of garbage" referred to Dubria, we would not conclude that trial counsel fell below the Strickland standard by not objecting. Cf. United States v. Laurins, 857 F.2d 529, 539 (9th Cir. 1988) (statement that defendant was a liar could be construed as a comment on the evidence). While it is clear that prosecutors cannot express their opinion about a defendant's guilt or vouch for government witnesses, see United States v. Molina, 934 F.2d 1440, 1444 (9th Cir. 1991), a prosecutor is free to voice doubt about the veracity of a defendant's story. See United States v. Sarno, 73 F.3d 1470, 1496-97 (9th Cir. 1995); Molina, 934 F.2d at 1445 (the inference that one side is lying is unavoidable).

Dubria also claims that the last four lines of this portion of the prosecutor's closing argument improperly suggested to the jury that the prosecutor had personal knowledge of Dubria's character and guilt. n6 The prosecutor called Dubria a liar. He then stated that Dubria was "much worse than that. I'm not going to tell you. You can imagine some of the things I would tell you . . . I'm not

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n6 The district court certified this issue for appeal.

going to tell you, because you know." The meaning of these words is unclear. These lines could refer to Dubria as a murderer and a rapist - what the prosecutor was trying to prove at trial. Given the ambiguity in these words, we conclude that a reasonably competent attorney could have refrained from objecting.

3. Remaining Claims

We have also considered Dubria's other claims of violation of Miranda, instructional error, ineffective assistance of counsel, insufficiency of the evidence, exclusion of evidence of Klapper's knowledge of birth control methods, and unconstitutionality of his sentence, and hold that they are without merit.

AFFIRMED.

PREGERSON, Circuit Judge, dissenting:

Dubria did not get a fair trial. The trial judge allowed the state, in its case-in-chief, to place into evidence a tape of a pre-arrest interview of Dubria. On that tape, Detective Detar made highly inflammatory statements in an effort to elicit information from Dubria about the circumstances surrounding Jennifer Klapper's death. Later, a transcript of the tape was given to the jury. Because I believe that admitting the tape and transcript of the pre-arrest interview into evidence violated Dubria's due process right to a fair trial, I respectfully dissent.

The pre-arrest interview of Dubria contained in the tape and transcript was not innocuous. During the interview, Detective Detar repeatedly: (1) stated that he believed that Dubria was responsible for Klapper's death; (2) told Dubria that the judge and

jury would not believe his story; and (3) stated that other witnesses and evidence existed that proved that Dubria was responsible for Klapper's death. Indeed, the tape and transcript of the pre-arrest interview included long narratives during which Detective Detar reiterated his opinion that Dubria was responsible for Klapper's death. For example, the interview included the following exchanges:

Detar:
I think, that this was probably just an accident, okay. But there's no question . . .
Dubria:
But detective . . .
Detar:
But listen. Wait, wait, wait . . . let me finish, let me finish.
Dubria:
Okay.
Detar:
There's no question. The evidence is conclusive.
Dubria:
No.
Detar:
That your [sic] responsible. Okay?
Dubria:
No.

* * *

Dubria:
Okay, detective, can I ask you a question . . . unintelligible . . .
Detar:
Sure.
Dubria:
Because your [sic], you saying that I had something to do with her death. What, what's the evidence that you [sic] telling me that I have to do it . . .
Detar:

Wait, wait, wait, wait, wait, wait, wait, wait a minute, wait a minute. I'm not here to play any kind of game.
Dubria:
I understand.
Detar:
I want you to understand something. You know what happened there and, and I know what happened there . . .

Dubria:
Okay.
Detar:
So now this is the opportunity for you to come clean, for you to do something good for you to day. . . (sound of sigh), look guys I need to tell you something.
Dubria:
Um-hum.
Detar:
. . . a, this is what happened.
Dubria:
Um-hum.
Detar:
Um, I messed up and I'm sorry.
Dubria:
Um-hum.
Detar:
Um, I believe and there's no doubt in my mind.
Dubria:
Um-hum.
Detar:
That you caused her death. And I don't think that your [sic] a murderer or anything like that . . .
Dubria:
Uh.
Detar:

But a, I have no doubt that, that you caused her death. Okay?
Dubria:
That's a, that's a strong accusation . . .
Detar:
So what I'm asking this, you know, I'm not accusing you of anything. I'm stating what I feel the facts are.
Dubria:
Right.
Detar:
And the facts show that your [sic] responsible for it . . . .

* * *

Detar:
I, I'm just flabbergasted, I, to be honest with you Sam, I think your [sic] digging yourself in a hole. . .
Dubria:
Um-hum.
Detar:
. . . that is going to cause you more grief cause I'll tell you something. What's gonna happen is . . . either "A" your [sic] a cold blooded murderer . . .
Dubria:
No, I'm not.
Detar:
Listen to me. Listen to me. This is important for you to understand. I want you to grasp this because I do care. Okay, if you lie to us, then the jury and everybody else in the world is gonna say, he's a cold blooded murderer. Okay? Listen to me I'm not done yet. Okay. Now listen to me.
Dubria:
Alright.
Detar:
Either "A", that's what [sic] gonna happen, or "B" it's gonna come across like, he made a mistake. It was an accident. He didn't mean to kill her, as a matter of fact he was so distraught and upset

about the fact, that he did CPR, he called the paramedics, it was a mistake, it was an accident. The jury and the judge will believe that. They're not going to believe all these lies.

As evidenced by the excerpts, for long periods of time during the interview Detective Detar simply stated his opinion about what happened to Klapper and did not ask Dubria any questions. At one point, Detar explained to Dubria his theory about what occurred the night Klapper died. When Dubria protested that Detective Detar was "putting words in [his] mouth," Detar replied, "I really believe this." Additionally, Detective Detar repeatedly told Dubria that no one on the jury would believe his story:

Detar:

I [can write down your version of the events w]hich everybody in the world is gonna know is a lie, or I can tell them the truth about the issue. That there was a mistake, that it was an accident . . .

* * *

Detar:

They're not gonna believe that you have no clue as to how she died. Think about it!

* * *

Detar:

Sam, I want you to think about what your [sic] saying. I want you to think, you gotta get something good going for you. If you tell that story man, there ain't nobody that's going to believe that.

* * *

Detar:

I realize what your story is. What I'm trying to tell you is, it's obvious to everybody that that's not the truth.

Moreover, several times during the interview Detective Detar referred to other "evidence" that established that Dubria was responsible for Klapper's death. This other "evidence" was not introduced at trial because it did not exist. Detar simply referred to such evidence as an interrogation tactic to get Dubria to admit that he was guilty. But the jury heard the tape and read the transcript and thus was given the distinct impression that other evidence, apart from the evidence admitted at trial, proved that Dubria was guilty. For example, the tape and transcript included the following exchanges:

Detar:
Okay. If I told you someone said you were responsible for her death, what would you say?

* * *

Detar:
Talked to a lot of people.
Dubria:
Um-hum.
Detar:
And a, pretty much, we've determined that you are responsible for her death.

* * *

Detar:
You don't have any access to chloroform?
Dubria:
No.
Detar:
So all the people that I talked to that say that chloroform is all over the hospital, will say, are liars?

* * *

Detar:
We've got experts, medical examiners, toxicologist. . .
Dubria:
Um.

Detar:
They did all the tests Sam!
Dubria:
Um.
Detar:
She died of chloroform poisoning. There were [sic] no other causation, absolutely zip. She died of an overdose of chloroform.
* * *

Detar:
Yeah. Let me tell you something. It's not just the chloroform intoxication that points to you.
Dubria:
Okay.
Detar:
There's a lot of other things that point right at you.

The State proffered the unedited tape of the interview in its case-in-chief to show that Dubria had no explanation for the presence of chloroform in Klapper's body. Although only a small portion of the interview actually dealt with the presence of chloroform in Klapper's body, the entire interview was entered into evidence. None of Detar's inflammatory statements were excised from the tape before it was played to the jury. Later, over Dubria's counsel's objection, a transcript of the interview was given to the jury. Like the tape, the transcript was not edited at all.

The majority opinion concludes that, "viewed in its entirety," the tape and transcript merely show an "unremarkable interview" because, according to the majority, "there was nothing in Detective Detar's statements that suggested evidence or theories of the case that were not presented at trial." See Maj. Op. at 11361. I disagree. In the interview, Detective Detar did suggest

that other evidence existed that was not presented at trial. Specifically, Detar falsely stated that other individuals had claimed that Dubria was responsible for Klapper's death, that all of the state's experts did "all the tests" and determined that Klapper positively died from chloroform poisoning, and that chloroform was "all over the hospital" where Dubria worked. Thus, I disagree with the majority's characterization of the interview as "unremarkable."

Additionally, the introduction of the tape and transcript of the pre-arrest interview is particularly troubling because the prosecution's evidence against Dubria was far from overwhelming. By entering into evidence the tape and transcript, the prosecution was able to present the jury with Detective Detar's theory of how and why he thought that Dubria killed Klapper. The long narratives by Detective Detar only served to inform the jury of Detar's otherwise inadmissible opinion that he had no doubt that Dubria had caused Klapper's death, and that no one - not the judge or jury - would believe Dubria's version of events. It is unrealistic to believe that such prejudicial evidence did not impact the jury's ability to evaluate, fairly and objectively, the evidence against Dubria.

Moreover, it is also significant that the inflammatory statements, which the jury heard and read, were made by Detective Detar, an investigating officer in the case. We have repeatedly acknowledged the inherent danger in admitting opinion testimony of law enforcement officers because we recognize that such testimony "carries an aura of special reliability and trustworthiness." United States v. Gutierrez, 995 F.2d 169, 172 (9th Cir. 1993) (quoting United States v. Espinosa, 827 F.2d 604, 612 (9th Cir. 1987)). Indeed, in United States v. Harber , 53 F.3d 236 (9th Cir. 1995), we noted that the admission of an investigating officer's opinion about the defendant's guilt is a

"classic example of presumptive prejudice." 53 F.3d at 241. And in Harber we held that "extrinsic material consisting of a governmental official's summary of the prosecution's evidence, and his recommendation that an indictment should be requested because the accused is guilty, is inherently or presumptively prejudicial where it is read and relied upon by the jury." Id. (emphasis added). I see no valid basis for distinguishing Harber from the present case. In both cases the jury read and relied on extrinsic evidence that consisted of an investigating officer's opinion that the defendant was guilty. Consequently, I believe that admitting the tape and transcript of the pre-arrest interview in this case was "presumptively prejudicial."

Given the highly inflammatory content of the tape and transcript, and that the statements were made by an investigating officer, I conclude that the admission of the evidence "so fatally infected the proceedings as to render them fundamentally unfair." Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991). The trial judge did give the jury cautionary instructions. But, in light of the extremely prejudicial nature of Detar's statements, as well as the fact that a transcript of the interview was also later given to the jury, see United States v. Hernandez, 27 F.3d 1403, 1408 (9th Cir. 1994) (noting that juries may put undue emphasis on particular testimony if provided with transcripts), I cannot conclude that the instructions cured the impact of Detar's statement on the fairness of Dubria's trial, see United States v. Gillespie, 852 F.2d 475, 479 (9th Cir. 1988) (finding under the circumstances that "the trial court's curative instruction to the jury was not sufficient to obviate the prejudice.").

Additionally, in contrast to the majority opinion, I believe that Dubria's ineffective assistance of counsel claim has merit. Dubria's ineffective assistance of counsel claim is based on his trial counsel's failure to object during closing argument when the

prosecutor called Dubria a "piece of garbage" and suggested that he had personal knowledge of other bad acts committed by Dubria. The prosecutor stated:

But to get up here and get on the stand and look at you people and tell you that story that he told you in front of the family, this piece of garbage, making up every bit of it, he's the biggest liar you've ever encountered. He's a lot worse than that. I'm not going to tell you. You can imagine some of the things I would tell you what he really is. I'm not going to tell, because you know. You know in your hearts what else.

To establish ineffective assistance of counsel, Dubria must demonstrate that his counsel's failure to object was deficient, and that the deficient performance prejudiced Dubria's defense. See Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Clearly, Dubria's counsel's failure to object was deficient. The prosecutor engaged in misconduct when he suggested that Dubria was a "piece of garbage." n1 See United States v. Sanchez, 176 F.3d 1214, 1225 (9th Cir. 1999)

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n1 I disagree with the majority's conclusion that the prosecutor was simply referring to Dubria's story when he stated "this piece of garbage." Nonetheless, if the prosecutor had indeed been referring to Dubria's story when he said "this piece of garbage," an objection from the defense would have resulted in clarification for the jury. The statement is certainly unclear, and a reasonable person could conclude that the prosecutor was calling Dubria "a piece of garbage."

(prosecutor commits misconduct when denigrating the defense as a sham); United States v. Molina, 934 F.2d 1440, 1444 (9th Cir. 1991) (prosecutor may not express his opinion of the defendant's guilt or his belief in the credibility of the government's witnesses). And the prosecutor disregarded his obligation "to avoid improper suggestions, insinuations, and especially assertions of personal knowledge," United States v. Edwards, 154 F.3d 915, 921 (9th Cir. 1998), when he told the jury that Dubria: "is a lot worse than [the biggest liar you've ever encountered]. I'm not going to tell you. You can imagine some of the things I would tell you what he really is." There was certainly no tactical advantage to be gained by Dubria by allowing the prosecutor to make such improper comments. Therefore, I would find that Dubria's counsel's failure to object to closing argument fell below the objective standard of reasonable representation.

Whether the ineffective assistance prejudiced Dubria's defense is a closer question. To demonstrate prejudice, Dubria "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Although Dubria's counsel's deficient performance alone may not have altered the outcome of Dubria's trial, I conclude that the cumulative impact of the prejudice from this harm and that harm caused by the admission of the unredacted tape and transcript of Dubria's pre-arrest interview, deprived Dubria of his right to a fair trial. See Mak v. Blodgett, 970 F.2d 614, 622 (9th Cir. 1992).

Accordingly, I would reverse the district court's denial of Dubria's habeas petition.